# Supreme Court of The United States



OCTOBER TERM, 1943

## No. 154

ANDERSON NATIONAL BANK,
Suing on Behalf of Itself and All Other Similarly Situated,

Appellant,

*vs.*

H. CLYDE REEVES, Individually and as Commissioner of Revenue of the State of Kentucky and a Member of the Kentucky Tax Commission,
G. M. C. PORTER, and
R. L. McFARLAND, Individually and as Members of the Kentucky Tax Commission,
HUBERT MEREDITH, Individually and as Attorney General of the State of Kentucky,

Respondents

Appeal from the Court of Appeals of the State of Kentucky

## BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE

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## CASES CITED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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Herbert J. Rushton, Attorney General of the State of Michigan, as amicus curiae, presents this brief in behalf

of the State of Michigan and respectfully requests that it be accepted by this court and filed in this action. The reasons therefor are:

(a) The State of Michigan has a special interest in the questions and principles involved in this action, decision upon which might materially affect the rights and interests of the State of Michigan.

(b) Litigation is now pending, in which the State of Michigan is a party, involving questions and principles of law similar to those involved in the instant case.

(c) Administration of the laws of the State of Michigan relating to unclaimed or abandoned property has been suspended in its application to national banks by express direction of the Comptroller of the Currency of the United States, as indicated by letter of January 15, 1942, addressed to the Michigan State Board of Escheats. The relevant portion of that letter is as follows:

> "In the event of a suit or suits against Receivers of insolvent National banks located in the State of Michigan to require compliance with this State statute, all defenses available to both *operating* National banks and closed National banks will be interposed. The authorities relied on by our Receivers, in addition to Starr v. Schram, supra, and the decisions cited therein, will include Cook County National Bank v. United States (1882), 107 U. S. 445; Davis v. Elmira Savings Bank (1896), 161 U. S. 275; Guthrie v. Harkness (1905), 199 U. S. 148; Easton v. Iowa (1903), 188 U. S. 220; Deitrick v. Greaney (1940), 309 U. S. 190, and American Surety Company v. Bethlehem National Bank (1941), 86 L. Ed. (adv. sheets), page 231." (emphasis ours)

## PRELIMINARY STATEMENT

We concur with the results reached in the brief of the Attorney General of Minnesota as amicus curiae, filed in this action, in which the Attorney General of Wisconsin has joined. We shall endeavor to avoid as far as possible retreading the grounds covered by that brief, as well as the brief of counsel for the Commonwealth of Kentucky.

We believe it is fair to say that this controversy stems from a position taken by the Comptroller of the Currency upon the subject in question. That there is a state of hopeless confusion on the general subject here involved, due largely to the application of general principles enunciated by this court, and conflicting decisions of state courts and lower Federal courts, cannot be successfully disputed.

Therefore, we shall not in this brief add to the already existing confusion by an exhaustive comparison of authorities in an effort to differentiate one from the other. Instead we shall attempt to go straight to the root of the controversy and attempt to substantiate our conclusion that the confusion, conflicts and controversies were wholly unnecessary in the first place and should never have arisen.

The argument and conclusions reached in this brief are intended to state only the position of the State of Michigan relative to the questions involved. They do not necessarily run counter to the position taken by the Attorney General of Kentucky, or of Minnesota or Wisconsin. Indeed, we believe our conclusions reach the same result.

## ARGUMENT

### *I. THE THEORY OF ESCHEATS LAWS*

The present attack upon the Kentucky law of escheats (so-called) is predicted upon two main contentions stated on page 3 of appellant's brief. They are:

> "1. Does not the Escheat Act in escheating or taking deposits from national banks on account of inactivity violate the National Banking Act?
>
> "2. Does not the Escheat Act in escheating or taking presumed abandoned deposits from national and state banks and presumed abandoned property from others without suit, effective notice to the owner, hearing or judicial decree violate the due process clause of the Fourteenth Amendment"?

With all due respect for counsel, we believe that appellant's contentions are predicated upon at least two faulty premises:

First. We think they have an erroneous conception of escheat laws in general, their intent and purposes, and the basis of their validity as a part of the body of the law of a state relating to property and property rights.

Second. We believe that appellant has taken a wrong premise in assuming that the question here presented involves the escheat of a bank deposit, as such.

We will discuss these propositions in their order.

Appellants variously refer to the Kentucky law as,—

> "essentially a revenue measure, the purpose of which is to get money for the state."

(Appellant's Brief, p. 32)

That,—

> "the whole theory of the act shows that the state is not taking over the deposits for the benefit of depositors. The pretext for the taking is that the owners have abandoned their deposits. If such is the case, they would naturally not seek to recover them back. This clearly shows that the act was not passed for the protection of the depositors."

(Appellant's Brief, pp. 32-33)

Language of similar import is used throughout the brief. They seem to look upon the law as a forfeiture or confiscation measure for the benefit and advantage of the Commonwealth of Kentucky, and apparently overlook the theory and basic doctrine upon which escheat laws in general are founded.

Every law of escheats is an integral and indispensable part of the body of laws of a state providing for and governing the descent and distribution of property having legal situs within the state or within its jurisdiction. This is true whether the law is incorporated in the general laws of descent and distribution of property, or contained in a separate code or system of laws by itself.

General laws of descent and distribution of property provide for descent,—

1. When the owner dies, leaving heirs—thus recognizing and creating the right of inheritance of property.

2. When the owner dies, leaving a will—thus vesting in the owner a right to make a testamentary disposition of his property.

It is obvious that these general laws, standing alone, would not be complete and cover all incidents of property, and property rights. There remain two distinct classes of property undisposed of, namely:

(a) Property of a person who dies intestate, leaving no legal heirs;

(b) Property of a person who is missing or who has disappeared, or who has abandoned, or failed to claim, his property under circumstances which give rise to a legal presumption of death or abandonment declared by statute.

Statutes covering these classes of property are referred to as "statutes of escheat," even though in some cases the term might be a misnomer.

Of course, the doctrine of reversion, which was the basis of the English laws of escheat, never obtained in this country, although some of the colonial Assemblies, notably Massachusetts, New Hampshire and Connecticut, at an early day enacted escheat laws of their own in which the escheat accrued to the school fund, but not as a reverter.

Perhaps we have space to observe that the word "escheat" is of French-Norman derivation, with a Latin root, meaning "chance" or "accident." As we know, the doctrine was introduced in England in 1066 by William the Conqueror following the Norman conquest. It was employed by the Crown to replenish the depleted Crown exchequer and to enable William to make a living for himself. His exhaustive survey of all of the property of the realm finally culminated in the celebrated Doomsday Book. The basis or theory of the English escheat laws was the one announced by William who proclaimed that the title to all property in

the kingdom both real and personal, vested in the Crown by virtue of conquest, and that upon failure of the title for any cause, including all sorts of fines, penalties and forfeitures, reverted to its source,—the Crown.

*"The doctrine, or theory of the law, upon which the validity of American laws of escheat, as announced by this Court is based is that public policy and the general interest of society require that property should not remain abandoned without someone representing it and without an owner legally capable of alienating it.*

*Cunnius v. Reading School District,* 198 U. S. 458.

We cannot conceive of any other valid basis, under Constitutional government, which would justify the state in assuming jurisdiction over the disposition of private property. Attached to this doctrine, or theory of law, is the rule against forfeitures always disfavored by the courts. Hence, the legal requirement that the rights of the missing owner must be safeguarded and that he must be protected by due process.

Therefore, when the legislature of the Commonwealth of Kentucky enacted the escheats law in question, it was but discharging the duty which it owed to society, and followed a rule of public policy which requires the state to enact laws providing for the descent and distribution of abandoned property.

Clearly, public policy and the general interests of society contemplate that property shall, as far as possible, be kept moving along the channels of trade and commerce and that title shall pass by transfer according to the needs of business.

It embodied in the law provisions to safeguard the depositor calculated to avoid the working of a forfeiture. Appellants assert that the legislature failed in the accomplishment of that purpose. It does not sound reasonable, however, to assail such a law with the charge that it was enacted for ulterior purposes and to swell the exchequer of the state.

In the Cunnius case it is further said:

> "It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and it therefore places him in the category of an incapable person, whose interest it is the duty of the law to protect."

On this score, the inquiry presented is as to just what the legislature may do, what kind of a law it may enact, to serve public policy, and the interests of society, as well as protect the incapable person. The appellant insists that the legislature may not, by law, provide for the appointment of a legal representative of the incapable person to act in his behalf to preserve and conserve his property. It says that the legislature would have power only to prescribe judicial procedure which must first be taken to escheat the title of the property; that any other method of protecting the incapable person would be violative of due process. We submit that such a contention runs counter to the whole purpose and intent of such laws, so frequently announced by this court.

The import of appellant's contention is that the legislature may not by law provide a method whereby the escheat of the title to the property shall be deferred as long as

possible, consistent with the principle that the property should not remain too long without definite ownership. Carried further, the contention would mean that the indefinite period of time, expressly provided by the Kentucky statute, during which the incapable person could reclaim his property, must be cut off by a drastic provision requiring immediate escheat of the title. That does not sound reasonable.

The escheat law of the Commonwealth of Kentucky, as well as the escheat law of the State of Michigan, or of any other state with like protective provisions, safeguarding the property rights of the individual, may be said to be a type of social legislation wherein all of the people, through their legislature, seek to protect the owner of property, and his possible unknown heirs, from loss due to chance or accident, or any untoward event beyond his control. The power of the legislature to enact such legislation is undoubted.

The clear intendment of that law is that the state shall be a conservator or trustee of the missing or incapable person. The failure of the legislature to use the express term "trustee" or "conservator" is unimportant, if that relationship is in fact set up.

The protective features of the Kentucky law have been fully discussed and explained in the brief of counsel for appellee. We are bound to say that the solicitude of the bank for the welfare of the missing or incapable person comes with a rather bad odor. Looking at it in a realistic way, we know of nothing in bank practices or customs which indicates that banks exhaust every source of information to discover the whereabouts of a customer who has

failed to claim his deposit, even over a long period of years. To say that the interest of the bank in the welfare of an incapable person is superior and paramount to that of the people of the Commonwealth of Kentucky does not have an appealing tone. Of course, the argument is that the bank is extremely desirous of protecting its customer and in performing its contract of deposit with him.

Keeping these principles in mind, and particularly noting the theory that these laws have their foundation upon a rule of public policy, calculated to serve the interests of society, it would seem that those laws should be construed by the courts in the most favorable light and should not be viewed with the same disfavor which attaches to other laws of a wholly different character. It would seem that every intendment should be indulged by the courts to uphold the validity of the legislation, if at all possible to do so.

*Appellant's second premise.*

Appellant's contention is predicated upon the assumption that the Commonwealth of Kentucky is seeking to escheat the money on deposit in the appellant bank in an action against the bank, pursuant to the Kentucky statute. To enjoin this, and any action of the State looking to the surrender of the inactive bank deposits, and other property, this suit was instituted.

The faulty premise is that bank deposits, as such, are escheatable.

*In our opinion, the money itself; or other property on general deposit in a bank, national or state, is not escheatable. Certainly, it is not escheatable while the bank is in existence and solvent.*

Earlier in this brief we pointed out that this court had repeatedly declared the basis of all laws of escheat in this country to be that public policy and the interests of society require that property shall not remain without *ownership*, and without *title* in someone capable of alienating it.

Therefore, *ownership* of property is the determining feature, a necessary element of an escheat. The purpose of such laws is to keep *ownership* alive and active.

*The ownership of the actual money on deposit in a bank, other than money deposited under special contract, is in the bank.*

This doctrine has been announced by this court at least as early as *Marine Bank v. Fulton Bank*, 69 U. S. (2 Wall.) 252, and has been consistently reaffirmed in.—

*Scammon v. Kimball*, 92 U. S. 362.

*Phœnix Bank v. Risley*, 111 U. S. 374 (with cases cited).

*Commercial Bank of Pa. v. Armstrong*, 148 U. S. 50.

*Jennings v. U. S. F. & G. Co.*, 294 U. S. 216 (d.p. 220)

*Dakin v. Bayly*, 290 U. S. 143 (d.p. 154) and cases cited in dissenting opinion.

In *Marine Bank v. Fulton Bank*, the general doctrine is stated thus:

"All deposits made with bankers may be divided into two classes, namely: those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of

> money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the bank; and the latter, in consideration of the loan of the money and the right to use it for his own benefit, agrees to refund the same amount, or any part thereof, on demand. It would be a waste of time to prove that this latter was a debtor and creditor relation."

The same doctrine is variously stated in other cases as being one in which the depositor or customer loans the money to the bank and transfers title thereto to the bank, *with the superadded liability or obligation of the bank to repay the loan upon demand.* The same doctrine is the law, or rule of decision, in most, if not all, states, and particularly the Commonwealth of Kentucky and the State of Michigan. It is also the law of the State of California.

> *Armstrong, Receiver, v. National Bank of Boyertown*, 90 Ky. 431, 6.
>
> *Perley v. County of Muskegon*, 32 Mich. 132 (20 Am. Rep. 637).
>
> *Plumas Co. Bank v. Bank of Rideout*, et al., 165 California 125.

The conclusion seems irresistible that so far as the bank deposit is concerned, there is no failure of ownership, nor is there any failure of title, because both are in the bank. The money has been, pursuant to recognized customs and usages, commingled with the other moneys of the bank. As stated in the Jennings case, it is fungible property. It is not subject to replevin or any other possessory action on the part of anybody. The only qualification upon the bank's ownership and title is its obligation or liability to repay the loan on demand.

Of course, money on special deposit, such as trust or fiduciary deposits, is in a different category, but even in such case, the money or property is not escheatable as against the bank.

*The real subject of the escheat—the res, in case of money on deposit,—is the intangible property of the customer or depositor which entitles him to repayment of his loan upon presentment and demand. This may be evidenced by a bank passbook, certificate of deposit, cashier's check, or whatever receipt the customer or depositor received from the bank when he made the deposit. These evidences of indebtedness, whatever their character, represent choses-in-action which constitute property which, under the theory of the law, the owner has abandoned and which has become ownerless by reason of such abandonment.*

These choses-in-action—and we use the term in its broadest sense—constitute the property to which the Kentucky law is directed, and over which it seeks to exercise jurisdiction. It is the only property which may be escheated under the Kentucky law in case escheat finally becomes necessary or expedient.

When a legal representative of the owner of such property has been duly appointed as provided by the law of the state, these choses-in-action may be presented by him to the bank for payment and that is all the bank has to do about it. Its obligation and its liability to repay the loan has become absolute, and refusal to honor the demand would constitute a breach of its contract. There would be no occasion for the public representative to resort to escheat proceedings in order to secure repayment of the loan. Indeed, as

we have above stated, such escheat proceedings could not be maintained by him as against the bank itself.

In such case, the public representative is only marshaling the assets of the estate of the absentee in the same way as would an ordinary legal representative of a decedent estate. The bank, merely because it is a bank, would occupy no different relationship than an ordinary debtor or depository.

These evidences of indebtedness forming a part of the assets of the estate of the absentee might be promissory notes, or other negotiable paper, contracts, stocks, bonds, or other security which the absentee has abandoned. Certainly it would be an absurdity to say that the legal representative of the absentee must institute escheat proceedings against the obligors in such papers and documents instead of collecting the debt by ordinary processes.

We have not overlooked language employed in opinions in several cases which refer to a bank depositor as "the owner of the deposit." One of these cases is,—

*Security Savings Bank v. California*, 263 U. S. 282.

However, we construe this language more as language of convenience rather than of strict application. We think the effect of the language used is explained away by other language of the opinion. Certainly it would not be intended to overrule, in any sense, the doctrine in *Marine Bank v. Fulton Bank*, supra. To overrule that doctrine would have serious consequences and upset the banking laws of this country, as well as the Bank Collection Code.

Further, decisive opinions of that character are not overruled in any such indirect way.

Perhaps it would not be too trite to explain by illustration what we mean. Assume that the public representative of the estate of the absentee should discover an unpaid promissory note. If the note were due, it would be his duty to present it to the maker for payment. If it were not due, it would be his duty to hold it until it became due. If payment were refused, it would be his duty to enforce collection by suit. It would be absurd to say that he must, under any escheats law, escheat the money or other property the maker received when he gave the note. In other words, the escheat would operate against the note itself, or the avails of its collection, and not against the money or property of the maker.

The same illustration would apply to stocks, bonds, or other securities which the public representative might discover among the assets of the absentee estate. Certainly the public representative would not be foolish enough to institute escheat proceedings against the obligors of the securities or other property. He could not maintain the proceedings if he did for the very obvious reason that the obligor has no escheatable property in possession. The obligor could be required only to meet and discharge his obligation. If he refused to pay, payment could be compelled by ordinary legal processes. He could not be subjected to escheat proceedings.

It would seem therefore that any concern or anxiety on the part of the appellant bank that it is likely to be subjected to escheat proceedings under the laws of the Commonwealth of Kentucky, are wholly unfounded. One may search

in vain to find in the Kentucky statute any provision providing for a direct escheat of money on deposit in a bank, as against the bank. Indeed, it is extremely doubtful that the law authorizes or forms any basis for such an escheat. It refers wholly to "abandoned property." In our opinion, the 1942 amendment of the Kentucky law (Appellant's brief p. 70) clearly discloses the intent of the legislature in that respect. The Kentucky law, like most statutes of escheat relating to abandoned property, requires a report of unclaimed property. The office of such a report is manifest. The law anticipates that a large bulk of property located in the state may be abandoned without the state having knowledge of it and without adequate means of discovering it. Therefore, the requirement of a report by depositories.

The legislature would have no constitutional power to give its Commissioner of Revenue, or any other like officer or agency of the state, visitorial powers over banks, trust companies or other depositories of property. It can only require reasonable reports. From these reports, there may be obtained secondary evidence of title to abandoned property of the absentee estate which would enable the legal representative to recover, even in the absence of finding the original evidences, such as,—in the case of a bank, a passbook, certificate of deposit, or other receipt. Thus the records of the bank constitute only evidentiary proof of the existence of the abandoned property and its nature.

The money or property on deposit with a bank is not the thing which gives value to the abandoned property. Instead, the liability of the bank to repay the loan is what gives value and vitality to it.

On page 25 of its brief, appellant says:

> "Of course a state can escheat a deposit in a national bank where there has been a judicial determination of death intestate without heirs or any other judicial determination showing that there is no present owner of the property. National banks every day recognize court orders regarding executors, administrators, committees, receivers, etc."

What we have said above sufficiently indicates that we cannot subscribe to this proposition.

In its other aspect, this statement narrows the inquiry to one which would draw a distinction between a legal representative of the absentee estate, appointed in judicial proceedings, and a legal representative designated in the law itself, with specially designated and limited powers and duties.

So far as the existence of a distinction between a case of an owner of property dying intestate without heirs, and an owner who disappears or for any reason has failed to claim his property or exercise ownership over it, there is none. Both, under the theory of the law, and in fact, have abandoned their property. The former has abandoned it by failure, in the absence of heirs, to make a testamentary disposition of it and continue its alienability. The latter has abandoned for reasons unknown, but as said in the Cunnius case, presumably against his will which raises a presumption of abandonment declared by statute.

It is elementary that reasonable statutes of presumption are valid and will be upheld by the courts. Particularly will they be upheld when such statutes relate to the descent and

distribution of property because they are necessary and indispensable to protect the interests of society.

On page 26 of appellant's brief, counsel say:

> "Our point is that a state cannot regulate a national bank by prescribing how long national banks can retain deposits whether active or inactive. In *First National Bank of San Jose v. California*, 262 U. S. 366, this court pointed out the danger of permitting state interference with deposits in national banks."

We are impelled to say that here again appellant follows a false premise by assuming that the Kentucky law seeks to escheat money itself or other property on deposit in appellant bank.

## *II. THE SAN JOSE CASE*

We feel that the decision in the San Jose case could very well have followed the doctrine laid down in *Marine Bank v. Fulton Bank*, supra, as well as that announced in the Cunnius case, and thus disposed of the issues involved in that case. However, we find from an examination of the briefs of counsel filed in the case that the rule of decision in those cases was not presented to the court.

The fact is inescapable that this case has received a construction and interpretation which has resulted in the multitude of controversies, conflicts of decision and confusion which we have heretofore referred to in this brief. From it stems not only the contentions made in the instant case, but rules and opinions of the Comptroller of the Currency, as well as antagonistic attitudes assumed by national banks throughout the country.

In that case the Attorney General of California brought suit against the First National Bank of San Jose under Section 1273 of the California code which provided that all deposits of money in banks, which have remained unclaimed for more than 20 years and where the depositor or claimant has filed no notice of present residence within that time, shall escheat to the State. The Attorney General is required to start suit against the bank and such depositors to recover the amount of the deposits, and if in the suit it is determined that the moneys are unclaimed, then the court must render a judgement escheating them to the state. The facts were that the deposit of a certain depositor had been unclaimed for more than 20 years, no notice of address having been given to the bank nor any other activity having occurred in connection with the deposit, and the depositor was not known by the President or managing officers of the bank to be living. The California Supreme Court affirmed a judgment escheating the deposit, but this court reversed the California court on the ground that the California statute qualified in an unusual way the contract between the bank and the depositor, because different states might have similar laws of varying length of time of dormancy of deposits, and prospective depositors might hesitate to make deposits in national banks and thus submit their funds to possible confiscation.

The decision came down in 1923. Since that time the status of national banks as instrumentalities of the Federal government has been drastically changed. Federal Reserve Banks have to a marked degree supplanted national banks in respect to their use as governmental agencies. National banks no longer may issue circulating notes, and doubtless their power to do so cannot be revived without further Congressional legislation. It can be safely said that the or-

dinary national bank of today is not far different respecting its obligations to the government than state banks. Of course, these facts would not be wholly determinative of the questions here involved, but they have their application.

While we are strongly inclined to wholly concur with other counsel who have filed briefs in this case, in the conviction that the case should be overruled, we realize the possibility, remote as it may be, that it may be clarified so as to put an end to all doubt as to its meaning.

We are aware that the decision in the case had a per curiam approval in,—

*National City Bank v. Philippine Islands*, 302 U. S. 651, as well as in,—

*Starr v. O'Connor* (*Schram*), 118 Fed. (2d) 548, Certiorari denied, 314 U. S. 695.

The original records and files in the Philippine case disclose an escheat statute of the Islands (p. 15 of Appellant's Petition for writ of certiorari), which provides for an out and out forfeiture to the territory of all bank deposits that have been dormant for more than 10 years, and dormancy alone is sufficient to escheat them directly to the territory. No presumption of abandonment is involved, since under a different statute of the territory, presumption of abandonment obtains only after a lapse of 15 years. The Philippine escheats statute makes no provision for recovery by anybody from the territory after the deposits have been escheated.

The authority of the case of *Starr v. Schram* is clouded by reason of an unusual development which occurred during the progress of the case.*

An analysis of the statute in the San Jose case, as quoted by the court at the beginning of the opinion, discloses that it declared an outright escheat to the state of a dormant or inactive bank deposit. The court said:

> "It further directs the Attorney General to institute actions in the Superior Court for Sacramento County *against banks* and depositors to recover all such amounts, 'and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and command said bank or banks to forthwith deposit all such moneys with the State Treasurer. * * * '" (emphasis ours)

To all intents and purposes, the power of the court to exercise its discretion and judgment upon the issues was denied by statute. The statute compelled a judgment of escheat because of mere inactivity, or so-called dormancy, notwithstanding the possibility that the absentee was still

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*This was a declaratory judgment action. After the decision in the United States Circuit Court of Appeals of the 6th Circuit came down, the Michigan legislature drastically amended the Michigan law involved in that case. The petition for certiorari filed in this court by the Attorney General of Michigan was forcibly assailed and objected to on the ground that the statutes involved had been drastically amended so that the case had become moot. That any declaration of the Circuit Court as to the validity of the old law would be valueless and futile. These objections were sound and tenable and could not be very well opposed. Of course, whether or not those objections influenced or controlled the denial of the writ, is not reported.

alive, or that he had known legal heirs or that such claimed absentee might be able to supply proofs that he had no intention to abandon the property or that he had not really done so.

A similar interpretation of the San Jose case was made by the 6th Circuit Court of Appeals in *Territory of Alaska v. First National Bank*, 322 Fed. (2d) 277. The court found the escheats statute of Alaska applicable to National banks and distinguished the San Jose case, saying that in that case the California law was invalid as to National banks as "qualifying in an unusual way agreements between National banks and their customers," and that "the California statute purports to 'escheat' and forfeit to the state any deposit though the depositor may be alive or may have died leaving heirs, where for the period of 20 years the account has been wholly inactive respecting both deposits and withdrawals and neither the depositors nor any claimant 'has filed any notice with such bank showing his or her present residence.'"

We have attached considerable significance to the following statement in the opinion in the San Jose case:

> "and we think, *under circumstances like those here revealed*, a state may not dissolve contracts of deposit, even after 20 years, and require national banks to pay to it the amounts then due: the settled principles stated above oppose such power." (emphasis ours)

In any event, the words "under circumstances like those here revealed" indicate that under other circumstances the decision might have been different.

In the respect indicated, as well as others, the law of California differs radically from the law of Kentucky. The latter law is not open to such an objection because it requires the Commissioner of Revenue, whenever it becomes necessary in the interests of society, to institute direct proceedings for the escheat of the title, and abandonment with all its incidents must be established. This matter has been fully discussed in the brief of counsel for the appellee.

It is clear that this court in the San Jose case looked upon the proceedings as an attempt to dissolve the contract of deposit by a direct escheat under circumstances which would work a forfeiture. The Kentucky law proceeds on no such basis. Instead, it does not seek to "dissolve the contract of deposit," but rather, seeks to keep that contract in existence and in full force and effect, and in due proceedings and processes make demand upon the bank to fulfill the contract by paying the amount of the deposit to a legally constituted authority of the state representing the depositor. We submit that that is a far different situation.

It is inconceivable that the opinion in the San Jose case intended to hold that a national bank, or any other bank for that matter, could indefinitely refuse to repay a loan made to it by a customer and continue the credit on its books no matter what the circumstances and regardless of the provisions of any state law.

Such a rule would run directly counter to the rule in—

*Provident Inst. for Savings v. Malone*, 221 U. S. 660, and the opinion of this court in—

*Security Savings Bank v. California*, supra, decided less than six months subsequent to the San Jose case, in which the court said:

> "The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged. *Louisville & Nashville R. R. Co. v. Deer*, 200 U. S. 176. It is no concern of the bank's whether the State receives the money merely as depositary or takes it as an escheat."

It is also inconceivable that Congress, in enacting the National Bank Act, intended any such result. To have done so, Congress would have violated the 10th Amendment of the Federal Constitution.

## *III. THE FEDERAL POWER*

The power to provide for and govern the descent and distribution of property having locality in the state, or coming under its jurisdiction, is a reserved power of the State and of the people, under the 10th Amendment, and not a granted power of the United States under the Constitution.

*Christianson v. King County*, 239 U. S. 356, (d.p. 366)

Congress has at no time by any direct action, attempted to exercise the power thus reserved to the states in relation to such property and obviously could not do so.

The National Bank Act cannot be construed as such an attempt. That would amount to accomplishing by judicial construction that which could not be done by an act of Congress. Of course, this does not mean that a state law which violates the Constitution of the United States or the Constitution of the state itself, or which conflicts with a *valid* act of Congress, could be upheld.

Our construction is further influenced by the court's reference to the statute as imposing limitations and restrictions as various and numerous as the states, and as obviously an attempt to qualify in an unusual way agreements between national banks and their customers. Also the following:

> "The depositors of a national bank often live in different states and countries; and certainly it would not be an immaterial thing if the deposits of all were *subject to seizure* by the state where the bank happened to be located." (emphasis ours).
>
> *San Jose Case, Supra.*

We are not impressed with the view that the failure of the Supreme Court of California to express an opinion upon the question whether the judgment of the Superior Court operated as a present escheat of the rights of the several depositors against the respective banks, or whether the depositors have a right to reclaim their deposits, is significant.

We think if that really influenced the opinion, the court would have stated a conclusion following the bare statement, or, following the well known rule of this court, would have decided the question itself in the absence of a decision by the lower court.

We feel bound to comment upon the last paragraph of the opinion emphasizing the necessity often pointed out by this court for protecting Federal agencies against interference by state legislation and declaring that the approved principle of obsta principiis should be adhered to.

On this proposition the opinion cites many cases, from *M'Culloch v. Maryland*, 4th Wheaton 316, down.

It is puzzling to note that all of these cases, except the case of *Davis v. Elmira Savings Bank* (which was a preference case) are tax cases, involving the question of the right of the states to tax the property or franchise of Federal agencies.

The right of Congress to determine whether and to what extent its instrumentalities may be taxed, is granted by the Constitution.

*Maricopa County v. Valley Bank*, 318 U. S. 357 (and cases cited on p. 361)

In that case the court said that the authority of the state to impose such taxes does not stem from the reserved power of the state under the 10th Amendment, but is a delegated power of Congress which may permit or prohibit such taxation.

The power of a state to govern the descent and distribution of property—which necessarily includes the escheat of unowned or abandoned property—stems directly from the 10th Amendment as a reserved power of the states. We submit that the analogy of the tax cases cited in the San Jose case is not convincing.

Carried to the ultimate, the language would give precedent in all cases of conflict between state and Federal agencies of government. Standing along in such bare fashion we think the statement is dangerous.

Considerable stress is given to a footnote in the reported opinion in Security Savings Bank v. California, supra (Appellant's Brief, p. 23).

There is no way of learning the authorship of that footnote. We do not know whether it is a part of the text of the opinion or whether it is the work of a reporter of the published volume. We are inclined to believe it is the latter because a search of the opinions of this court, and particularly of Justice Brandeis who wrote the opinion in the Security case, discloses the exercise by the court of meticulous care in making text reference to marginal notes. If this marginal note is a mere annotation, then it amounts to very little.

Appellants attach considerable importance to the statement made in the opinion in the San Jose case, that if California may thus interfere, other states may do likewise and instead of 20 years, varying limitations may be prescribed,—3 years perhaps, or 5, or 10; or 15.

If this statement is detached from the qualifying statement we have referred to, namely, "under circumstances like those here revealed, it might have a meaning which counsel for the appellant apparently give it. In that event, the statement, carried to its ultimate end, would amount to a holding that all escheat laws are invalid because they contradict the intent of Congress. The statement would also mean that a public representative of an absentee depositor

of a National bank who has abandoned his property could not make a demand upon a National bank for performance of its contract originally made with the depositor.

*We believe that not only did Congress not intend any such result as that, but that this court in that opinion did not intend any such outcome.*

On page 39 of its brief, appellant complains that the operation of the Kentucky law would deprive it of the *use* of property without compensation, and cites the case of

*Chicago R. I. & P. Ry. Co. v. U. S.*, 284 U. S. 80

That is a railroad rate case. We do not find it in point. Apparently the appellant claims that the use of property is a property right and it asserts that it has a right to use it. That is true. It has had the use of the money loaned to it for 10 years or more, possibly without interest, and without any return to its customer or depositor. To turn the illustration in the San Jose case around, this claim of the appellant would mean that the National Bank Act, fortified by the San Jose opinion, would permit the bank to hold onto the money it received from the loan, and refuse to pay it 10 years, 20 years, 50 years, or 100 years; or indefinitely.

We submit that Congress intended no such result and that this court in the San Jose opinion did not intend it.

We are aware that counsel for appellant makes this claim only in its relation to that part of the law which requires the Commissioner of Revenue to marshal the abandoned property and take it over under the proceedings prescribed in the act, and do not advance it as against escheat proceedings which counsel insist must be the sole procedure.

However, that only raises the question which we have already discussed relative to the right of the legislature to designate and limit the powers and duties of the Commissioner, and to appoint him in the first place.

*Contra-doctrine.*

Assuming for the moment that the San Jose opinion is all that its votaries claim for it, and that we are wrong in our contention that an escheat of a bank deposit as such is not involved in this case, and also assuming that the Kentucky statute authorizes escheat proceedings of money or other property on deposit in the bank, the question is then presented as to how far the opinion in the San Jose case controls decision in the case at bar.

It seems to us that the logical and rational approach to a discussion of this subject is most clearly and simply outlined in *McClellan v. Chipman*, 164 U. S. 347.

Mr. Justice White, writing in that case, after stating the general rules announced in *National Bank v. Commonwealth*, 9 Wall. 362, and *Davis v. Elmira Savings Bank*, supra, said:

> "These two propositions, which are distinct, yet harmonious, practically contain a rule *and an exception*, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States." (emphasis ours)

Thus this court lays down a formula declaring a rule and an exception, the exception falling into three distinct classifications:

1. When the state law expressly conflicts with a law of the United States.

2. When it frustrates the purpose for which National banks are created.

3. When the state law impairs the efficiency of the bank to discharge the duties imposed upon it by the laws of the United States.

We will discuss the exceptions in their order.

The only act of Congress with which the Kentucky law could possibly conflict is the National Bank Act.

Appellant's contention seems to be that the sole power to prescribe how long a bank may hold an unclaimed deposit abides in Congress. Well, if it does, Congress has failed to act. There is no provision whatsoever in the National Bank Act regulating or prescribing the length of time a National bank may hold a so-called inactive deposit. It could not so prescribe if it were disposed to do so.

The opinion in the San Jose case, despite the language quoted, does not prescribe the time. The opinion does say that "obviously, it attempts to qualify *in an unusual way* agreements between National banks and their customers, long understood to arise when the former received deposits under their plainly granted powers." (emphasis ours)

The words "in an unusual way" do not help much but, however that may be, it is difficult to discover in what way any procedure whatever taken under the Kentucky law

could qualify the contract of deposit between the appellant bank and one of its missing depositors. All the bank is asked to do is to recognize the legal representative of the absentee and honor his demand for performance of the contract of deposit.

Of course, if it is the law that the absentee is not entitled to be represented as a incapable person, the bank may undoubtedly reap its unearned profit, until Congress itself, or the courts, do something about it.

As to the second exception—*frustration of the purposes for which the appellant bank was created.*

It cannot be assumed that the bank was created for the purpose of operating on abandoned deposits, or to profit by chance or accident, or the misfortunes of its customers. Neither can it be assumed that Congress intended to create a Federal instrumentality for the purpose of evading state law providing for the descent and distribution of property.

We appreciate the absurdity of these assumptions, but they are nevertheless real in view of the construction given to the San Jose opinion.

As to the third exception—*impairing the efficiency of the bank to discharge the duties imposed upon it by the laws of the United States.*

We are inclined to the view that the principal duty imposed upon National banks by the laws of the United States is to perform its contracts with its customers. We do not believe that Congress contemplated that a National bank should add to its efficiency by acquiring and freezing

unearned property. Neither do we believe that the opinion of this court in the San Jose case means that. Further, we do not believe that Congress intended to create a Federal instrumentality whose efficiency would be increased through downright forfeiture of the property of its customers.

The contention of the advocates of the claimed doctrine of the San Jose case seem to argue that unless a National bank retains control of its customers' deposits under all circumstances, its purpose would not be fulfilled and others might hesitate to subject their funds to possible confiscation.

If the National Bank Act contained some provision, which it does not, prescribing the length of time, and under what circumstances, a National bank could refuse to honor a demand made by the legal representative of the absentee depositor, there might be some force to this contention. The sole question then would be that of the delegated power of Congress to enact such legislation.

This subject has been well treated in other briefs filed in this case, and we will not pursue it further.

The assumption in the immediately foregoing discussion is an unwarranted one because no question of escheat is involved and the decision in the San Jose case does not apply.

The basis of all escheat laws, several times emphasized in this brief, cannot be brushed aside. If it should be, the whole foundation of escheat laws is wrecked.

If the doctrine of *Marine Bank v. Fulton Bank*, supra, is overruled or ignored, the elaborate system of banking

throughout the United States, with all of its incidents, practices, customs and usages will be upset. Also the doctrine in that case is too sound to be disturbed.

We insist that there is no real and substantial conflict between the escheat law of Kentucky, or any other like law of escheat, and the National Bank Act. That, properly construed, they would harmoniously coexist and accomplish the intent and purposes of each in their respective fields of operation. More than that, a law of escheat would be found a workable and equitable instrument for the use of National banks in clearing away unclaimed or abandoned accounts which are always a dead weight on any prosperous business. State banks, and other depository institutions, have found it useful and convenient. There is no reason why National banks should not do so.

It is perhaps unfortunate that the several states do not have a uniform law of escheats. Probably they will never have one until someone takes the initiative as has been done in the case of other laws, both substantive and adjective. It would not seem that there is anything substantially wrong in the substantive provisions of escheat laws in general. It is only the procedural provisions which vary so much as to cause doubt and confusion.

The increasing need and importance of state laws relating to abandoned property is manifest on every hand. The greatly increased volume of personal property in the country adds to the necessity. The greatly multiplied activities and movements of the people in this machine age are causing a tremendous increase in accidental death. Wars have played their part. The Constitution of the United States places upon states not only the duty, but the burden of

governing and regulating the descent and distribution of this type of property.

It is obvious that the burden of the states is made heavier when Federal agencies and instrumentalities throw obstacles in the way of the operation of state laws. Comity between such agencies, the necessity of which this court has so frequently stressed, becomes more or less of a mockery and detrimental to the public interest.

We submit that all of the controversies of the past few years are unwarranted, and have been from the start. General principles announced by this court have received an unwarranted construction in their application to special conditions. The controversy did not start with the opinion in the San Jose case, but that opinion did precipitate things. It motivated rulings of the Comptroller of the Currency that National banks, solvent or insolvent, were not subject to state laws of escheat. National banking interests, who have avowedly taken an interest in the instant case, have seized upon the San Jose opinion as declaring their immunity from these state laws.

Our advice and opinion, given of course strictly as amicus curiae in this case, is that this court might consider the advanced position announced in all opinions of members of this court in *Graves v. New York, ex. rel. O'Keefe*, 306 U. S. 466, and conclusively and finally quiet this involved and unfortunate controversy. We feel that it would not be difficult to take the whole false structure and put it on a solid foundation; one that would be unimpeachable.

We feel warranted in advancing a suggestion to National banks and to the Comptroller of the Currency on the general

subject here discussed. We believe that national banks in their zeal to detach themselves as far as possible from the operation of state laws, have made and are making a serious mistake in the light of banks and banking.

Likewise, we believe that the Comptroller of the Currency, in assuming its present attitude on this question, is performing a distinct disservice to National banks throughout the country. Mature reflection should convince these interests that their position works directly to the advantage of state banks and is actually discriminatory against National banks.

When it becomes common knowledge of the investing and depositing public that state laws, particularly so-called laws of escheat, with their protecting and conserving provisions, are not applicable to National banks, there is bound to be a reversal of opinion. In other words; no person of good judgment would voluntarily enter into a contract of deposit with any bank if he knew that in case of his disappearance or the happening of some untoward event, his contract of deposit could not be properly represented; that if there were no person in existence entitled to petition for the appointment of a legal representative of his estate, the bank could indefinitely retain his deposit and the contract of deposit would remain unperformed on the part of the bank. If the depositor intended, in such an eventuality, that the bank itself should represent him indefinitely, and if he should never appear and was relieved from his liability under the contract, it is to be assumed that such an arrangement would be embodied in the contract itself. Naturally, that would be an unusual arrangement and one not contemplated in the ordinary contract of deposit of money in the bank.

## CONCLUSION

We respectfully submit that the decision of the Court of Appeals of the Commonwealth of Kentucky should be affirmed.

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